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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
Tariff Filing Requirements for ) CC Docket No. 93-36  
Nondominant Common Carriers )

COMMENTS

Introduction

One of the principal public policy challenges which the Federal Communications Commission (FCC) will face in this important proceeding is how best to craft rules which do not facilitate the kind of collective price signaling and tacit collusion which is inherent in any tariff filing regime. There is no perfect way to resolve this challenge (other than to prohibit the filing of tariffs altogether -- a step which the courts, of course, will not now permit). But there are two modest steps which could -- and should -- be taken to ameliorate what is fundamentally a bad situation.

Recommended FCC Actions

First, the Commission should flatly prohibit any direct or indirect references in the tariffs which nondominant carriers file to the prices that any of their competitors (including dominant carriers) charge. This could -- and should -- be accomplished by amending proposed new 47 CFR Sec. 61.22(b) along the lines shown below:

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(c) The tariff must contain the carrier's name, and the information required by Section 203(c) of the Act. Rates may be expressed in a manner of the carrier's choosing and may include ranges or maximums, provided that no direct or indirect reference shall be made to the rates charged by any other competing carrier.

Second, the Commission -- in order to further the public interest in more effectively competitive communications markets -- should also adopt (as part of its final order in this proceeding) an explicit requirement that all tariffs now on file by any carrier (dominant or nondominant) which make direct or indirect reference to a competitor's price be withdrawn within 10 days (and, if required by other provisions of the final order, refiled in a proper form).

#### Reasons For Such Recommended Actions

Nondominant carriers -- both domestic and international -- for some time routinely have filed tariffs with the Commission that provide, in essence, that the carrier's price will be AT&T's price less a specific percent. Under the draft rule that has been proposed in this proceeding, carriers could continue to file such tariffs. That would be inconsistent, however, with the public interest in competition as well as the Commission's longstanding

and commendable commitment to foster the maximum possible price competition.

#### Antitrust Concerns

"Baseline" or "benchmark" pricing practices on the part of companies which are actually or potentially competitive can raise significant antitrust and competition policy concerns. Cf. National Bancard v. Visa USA, Inc., 779 F.2d 592, 600-02 (11th Cir.), cert. denied, 479 U.S. 923 (1986). Tariffs which are explicitly based on the prices which competitors charge -- on their face -- would see always, or nearly always, needlessly to restrict price competition. See, e.g., Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 228 (D.C. Cir. 1986), cert. denied, 479 U.S. 1003 (1987).

Such "copycat" or "me-too" tariffs may tend significantly to inhibit price cutting for the purpose of gaining market share -- since any "price leader" will know that virtually all of its price reductions will be automatically matched by its competitors. Such tariff filings, too, may facilitate an altogether unhealthy degree of price collusion. See, e.g., United States v. Container Corp., 393 U.S. 333, 337-38 (1969); DuPont v. FTC, 729 F.2d 128, 137 (2d Cir. 1984).

Notably, Japan antitrust enforcement authorities for several years have prohibited the filing of such tariffs by competing domestic carriers on the ground they impair price competition.

### Expanded Opportunities For Price Competition

Long-distance carrier rhetoric and advertising notwithstanding, for most long-distance customers there is not in actuality a substantial level of price competition in U.S. markets. Virtually all consumer surveys conducted over the years indicated that, on a composite or "market basket" basis, a residential or small business customer is likely to pay just about the same price for long-distance service regardless of the carrier chosen. Such vigorous price competition as really exists tends today to benefit chiefly "national account" and other major communications customers.

This phenomenon reflects, in significant part, several key characteristics of the current long-distance market. For long-distance carriers, the largest single cost component today tends to be access payments to local exchange companies -- payments which account for upwards of half a given toll carrier's operating expenses.

Because the equipment employed and the traffic volume-produced "trunking efficiencies" of any of the top five carriers are roughly equivalent, manageable costs thus have tended to constitute a relatively small part of overall costs. Consequently, just as one would likely find in other markets where firms all face comparable costs, the level and intensity of across-the-board price competition in long-distance telephone today is not that great.

The fact that there is a limited potential for price competition, of course, makes capitalizing on those opportunities which remain not less but rather more important. For as the Supreme Court has long held, where lawful factors may limit competition, it is important to preserve, indeed, foster, whatever potential might remain. See, e.g., United States v. Philadelphia Nat. Bank, 374 U.S. 365 & n. 42 (1963); United States v. Alcoa, 377 U.S. 271, 279 (1964). But importantly, the FCC has underway initiatives in other proceedings which envision significant changes in the prevailing local exchange access regime.

#### Consistency With Parallel FCC Initiatives

A prime reason for fostering greater competition in local exchanges is, of course, to strengthen competition in exchange access markets which, in turn, could both stimulate local network modernization as well as lead to lower access charges (which, hopefully, would be passed along to customers in the form of lower long-distance rates, although the FCC has not necessarily mandated that pass-through in all instances).

It would make little sense for the FCC on the one hand to foster competition in local exchanges -- in order to place downward pressure on toll prices -- while, on the other, overlook the potential that toll carriers will seek to fix, stabilize, or maintain high prices through an expanded tariff filing regime.

The practical effect of rules that produce access cost reductions but do not facilitate toll price cuts would be to transfer money from local phone company shareowners to long-distance company shareowners. As there is no compelling public policy purpose for such intercorporate wealth transfers, an FCC program calling for more local competition becomes defensible, indeed, desirable from a public policy standpoint only if, accompanying that program are other policies aimed at facilitating price competition.

#### Resource Impact

The modest improvements in the Commission's draft rules that are recommended above should have little, if any, direct impact on the Common Carrier Bureau's already hard-pressed resources. This is because violation of FCC rules governing tariffs should give rise to private enforcement pursuant to section 208 of the Communications Act. Indeed, if the FCC were explicitly to bar the use of "me-too" tariffs by carriers and such tariffs were nonetheless filed, carriers' risk exposure under the Federal (as well as, potentially, State) antitrust laws would presumably be magnified.

Even assuming that there might conceivably be some minor effect on Commission resources, those effects almost certainly would be swamped by the benefits of more vigorous and sustained long-distance price competition -- especially as the FCC's parallel local access and "transport" proceedings go forward.

Conclusion

The twin, companion changes in the draft rules which are recommended above will not, by themselves, yield overwhelming public policy gains. They would, however, ameliorate the fundamentally anticompetitive consequences of the appeals court's unfortunate "forbearance" order. Furthermore, such changes would facilitate price competition in long-distance services generally -- an important and longstanding Commission goal. Accordingly, these recommendations should be adopted.

Respectfully submitted,



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